Tuwei v Republic (Criminal Appeal 27 of 2013)
[2023] KECA 1298 (KLR) (27 October 2023) (Judgment)

Neutral citation: [2023] KECA 1298 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 27 OF 2013

F SICHALE, LA ACHODE & WK KORIR, JJA

OCTOBER 27, 2023

BETWEEN

WALTER TUWEI .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Kericho (J. Mutava, J.) delivered and dated 24th April 2013 in HCCRA No. 14 of 2012)

JUDGMENT

1. The appellant, Walter Tuwei, was charged, tried and convicted for the offence of defilement contrary to section 8(1) as read with section (2) of the *Sexual Offences Act*. The particulars of the offence were that on June 25, 2009 within Bomet District of the former Rift Valley Province, the appellant caused his penis to penetrate the vagina of FC, a child aged ten years. Arising from the same facts, the appellant faced an alternative charge of indecent act with a minor contrary to section 11(1) of the *Sexual Offences Act*. Upon conviction on the main charge, the appellant was sentenced to life imprisonment. Dissatisfied with the judgment and sentence of the trial court, the appellant lodged an appeal to the High Court. His appeal was dismissed in its entirety in a judgment delivered on April 24, 2013 by J Mutava, J. The appellant was dissatisfied with the judgment of the High Court and is now before us on a second appeal.

2. The appellant challenges the decision of the High Court on grounds that life imprisonment as handed down by the trial court is unconstitutional; that the trial court did not exercise its discretion in sentencing; that the mandatory sentence violates his rights under Articles 25(c) and 50(2) of the *Constitution*; and that the complainant's age was not proved.

3. In a nutshell, the respondent's case at the trial was that on June 25, 2009 at about 8.30 pm, the appellant who was a boyfriend to the mother of FC, a child aged 10 years, came into his girlfriend's house and

defiled FC. At the time of the incident, PW2 SC, the mother to FC, had gone to attend a welfare group meeting leaving FC alongside her two siblings at home. It is said that when the appellant entered the house, he asked FC to allow him to sleep on her bed. FC acceded to that request as the appellant was a frequent visitor to their house and would always spend there. Later on, the appellant turned on FC and defiled her while threatening to hit her with an axe if she screamed. No sooner had the appellant began executing his ordeal than PW2 came knocking on the door. FC then ran to PW2 and informed her of what had happened. At that juncture, the appellant shoved PW2 out of his way and fled from the scene. PW2 took FC to Longisa hospital where one Dr. Birech confirmed that she had been defiled. The complainant was later arrested with the help of PW3 MKR and PW4 FC and surrendered to the police.

4. When this appeal came up for virtual on July 4, 2023, the appellant appeared in person while the respondent was represented by Ms Kisoo. The appellant submitting on the unconstitutionality of the life imprisonment provided in section 8(2) of the *Sexual Offences Act* contended that the provision was couched in mandatory terms hence depriving the courts of their discretionary

   sentencing power. He also submitted that section 8(2) of the *Sexual Offences Act* offends Article 14 of the *International Covenant on Civil and Political Rights* as it restricts the courts to prescribing a sentence predetermined by the lawmaker, which in his view, infringes on the doctrine of separation of powers. Further, that the said provision denied him the right to a lesser sentence under the law. The appellant relied on *Thomas Mwambu v Republic* [2017] eKLR to additionally submit that life imprisonment meted upon him was harsh and did not take into account his mitigation.

5. On his contention that the age of the complainant was not proved, the appellant relied on *Hillary Nyongesa v Republic* [2010] eKLR to underscore the importance of proving the age of the complaint in a charge of defilement. In support of his argument, the appellant submitted that apart from the indication of the age of the complainant in the P3 form, there was no other evidence adduced to confirm the age of the complainant. According to him, the evidence of age as contained in the P3 form ought to have been corroborated and without such corroboration it cannot be said that the complainant's age was proved beyond reasonable doubt. The appellant urged us to find that the evidence on the age of the complainant did not meet the required threshold hence invalidating his conviction and the sentence handed down against him.

6. In response, Ms Kisoo submitted that the complainant's age was established during *voir dire* examination when she testified that she was 10 years old. Counsel argued that this evidence corroborated the findings of PW5 CR who testified that Dr. Birech who examined the complainant and filled her P3 form estimated that she was 10 years old. Counsel relied on the case of *Mwalango Chichoro Mwanjembe v Republic* [2016] eKLR to submit that there are various means of proving a complainant's age as long as the evidence is credible and reliable. Counsel urged us to find that the evidence of *voir dire* and that of PW5 was credible and reliable in proving the complainant's age.

7. On the question of the constitutionality of the life imprisonment provided in section 8(2) of the *Sexual Offences Act*, counsel submitted that although the High Court in *Philip Mueke Maingi & 5 others v DPP & another* [2022] KEHC 13118 (KLR) had declared the mandatory nature of minimum sentences to be unconstitutional, the Court had not outlawed the life sentence.

   According to counsel, in the circumstances of this case, the appellant deserved no leniency and the life sentence should be affirmed. In conclusion, counsel for the respondent urged us to dismiss this appeal in its entirety.

8. This is a second appeal and therefore the jurisdiction of this Court is limited to matters of law. The law is clear that severity of sentence remains a matter of fact and not law. This is the edict of section 361(1)

of the *Criminal Procedure Code*. In discharging our mandate, factual findings remain as concurrently established by the two courts below with an exception of instances where the factual conclusion was arrived at as a result of misapplication of the law. In that regard, *Adan Muraguri Mungara v Republic* [2010] eKLR speaks to the jurisdiction of this Court thus:

> "Adan is now before us on his second and final appeal which may only be urged on issues of law (section 361 *Criminal Procedure Code*). As this Court has stated many times before, it has a duty to pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this Court to interfere."

9. We have duly reviewed the record of appeal as well as the submissions of both parties. This appeal raises two issues for determination, that is, whether the complainant's age was proved, and whether the life sentence meted on the appellant was imposed in a lawful manner.

10. It is a point of consensus between both parties herein, and indeed the correct legal position, that the of age the victim is an essential element of the offence of defilement under section 8(1) of the *Sexual Offences Act*. The point of departure is whether the evidence on record sufficiently established that the complainant was aged 10 years as at the time of the offence. Regarding the importance of establishing the age of the complainant in defilement cases, we refer to the decision of this Court in *Alfayo Gombe Okello v Republic* [2010] eKLR where it was stated that:

> "In its wisdom, Parliament chose to categorise the gravity of that offence on the basis of the age of the victim, and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8 (1)"

11. It is also important to point out that the prosecution is required to prove all the elements of the offence to the required standard of proof, that is, beyond reasonable doubt. In *Joan Chebichii Sawe v Republic* [2003] eKLR the Court stressed the need for the prosecution to "prove the case against the accused beyond any reasonable doubt."

12. It has been held in various decisions of this Court that a complainant's age can either be established through consistent and corroborated oral evidence or the production of documentary evidence. For instance, that documentary evidence is not the only way of proving the age of a victim in a defilement matter was affirmed in *Richard Wahome Chege v Republic* [2014] eKLR when the Court stated that:

> "On the contention that the age of the complainant was not established, it is our considered view that age is not proved primarily by production of a birth certificate. PW2 the mother of the complainant testified that the complainant was 10 years old. What better evidence can one get than that of the mother who gave birth? It is our considered view that the age of the complainant was not only proved by PW2 but supportive evidence was given by PW3 who examined the complainant, and the complainant herself."

13. We only need to add that the prosecution ought to endeavor to make available any documentary evidence establishing a complainant's age as such documents are more readily available in the present age and times.

14. From the record, and as rightly pointed out by counsel for the respondent, the evidence of the complainant's age is found in her *voir dire* examination when she stated that she was 10 years old. The second piece of evidence is traceable to the P3 form where Dr. Birech in Part C of the form estimated the complainant's age to be 10 years. It is important to observe that at the conclusion of the *voir dire* examination, the trial magistrate found that the complainant understood the essence of an oath and was to give sworn testimony. In the circumstances, we find the evidence on record corroborated and sufficient to prove that the complainant was aged 10 years. The appellant's assertion that the age of the complainant was not proved hence the offence was not established is therefore rejected. The issue of the age of the complainant being the only aspect taken up by the appellant in respect to his conviction, it follows that his appeal against conviction is without merit and is for dismissal.

15. The second issue for our determination is with regard to the legality of the manner in which the life sentence was passed by the trial court. Back in 2013 when the appellant's first appeal was dismissed, the implementation of section 8(2)-(4) of the *Sexual Offences Act* was based on the understanding that the graduated sentences legislated in accordance with the ages of the victims of defilement were the minimum sentences. We cannot therefore lay blame on the two courts below for having handed down the life sentence provided under section 8(2) of the *Sexual Offences Act*. In the recent past, there has been a paradigm shift on the jurisprudence in relation to the sentences under the *Sexual Offences Act*. The question as to the legality of mandatory minimum sentences under *Sexual Offences Act* has received attention from this Court and the High Court. The general inclination is that mandatory sentences are unconstitutional because they take away a trial court's discretionary power to pass the most appropriate sentence in the circumstances of a particular case. We find the decisions of this Court at Nyeri in Joshua Gichuki Mwangi v Republic, Nyeri Criminal Appeal No. 84 of 2015 and that of the High Court in *Maingi & 5 others v Director of Public Prosecutions & another* [2022] KEHC 13118 (KLR) to be persuasive in respect to the issue of the unconstitutionality of the mandatory sentences provided under the *Sexual Offences Act*. In the stated decisions, the courts held that it is only the mandatory nature of minimum sentences that is unconstitutional and that in appropriate cases, the minimum sentences can be imposed. We only need to point out that the issue of the constitutionality of life imprisonment is now pending for determination by the Supreme Court in an appeal by the State arising from *Julius Kitsao Munyeso vs Republic*, CR Appeal No 12 of 2021 where this Court sitting in Mombasa found the life sentence unconstitutional.

16. Having said the foregoing, and in the circumstances of this case, we find that the trial court in passing sentence observed that the offence with which the appellant was charged attracted a life imprisonment. This position was reiterated by the First Appellate Court where in the judgment delivered on April 24, 2013 the learned Judge stated that:

> "The ground that the sentence meted out against the Appellant was oppressive, inhuman and excessive cannot also find the light of day as Section 8 of the *Sexual Offences Act* is explicit that the punishment for defilement is life imprisonment. That section does not give this court any room for exercise of discretion which underlines the severity of the offence and the need for deterrent punishment."

17. The statements by the trial court and the High Court that the offence for which the appellant was convicted attracted a mandatory sentence of life imprisonment is what makes the appellant's appeal against sentence a matter of law thus granting us authority to address the issue. The aggravating factors in this case is the complainant's tender years and the fact that she had bestowed trust upon the appellant as a "father". The aggravating factors would therefore call for a severe sentence. However, this must be balanced out by the fact that although the record shows that the appellant had a previous conviction,

that conviction did not arise from a sexual offence. The appellant had also mitigated that he had young children to take care of. Considering all the factors, we find merit in the appeal against sentence. The appeal against sentence is allowed to the extent that the sentence of life imprisonment is set aside and substituted with a sentence of 35 years' imprisonment. The sentence shall run from the date of the appellant's conviction by the trial court on February 29, 2012.

DATED AND DELIVERED AT ELDORET THIS 27TH DAY OF OCTOBER, 2023.

F. SICHALE

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JUDGE OF APPEAL

L. ACHODE

....

JUDGE OF APPEAL

W. KORIR

....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR